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# The Spanish Community of Acquests and Gains and Its Adoption and Modification by the State of California

THE property relations of husband and wife are regulated in California, Arizona, New Mexico, Texas, Nevada, Idaho, Washington, Louisiana, as well as in Porto Rico, by the community of acquests and gains. The community system to some extent recognizes husband and wife as distinct persons, capable of holding separate estates, and therefore differs fundamentally from the common law, which merges the legal existence of the wife with that of the husband during coverture.<sup>1</sup> Representing as it does a foreign element in our law, it becomes of interest to trace its history. In this regard Judge Cope, in delivering the opinion of the Supreme Court of California in an early case,<sup>2</sup> said: "Our whole system, by which the rights of property between husband and wife are regulated and determined, is borrowed from the Civil and Spanish law and we must look to these sources for the reasons which induced its adoption and the rules and principles which govern its operation and effect."

The law of community property of the Mexican Province of California became the law of the present State of California through Article XI, Subdivision 14, of the first Constitution of California (1849) and the act of April 17, 1850, defining the rights of husband and wife. Section 2 of said act reads as follows:

"All the property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property."

This provision was derived, as has been indicated, from the

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<sup>1</sup> "The husband and wife are one person in law," etc., 1 Cooley's Blackstone, page 401.

<sup>2</sup> Packard v. Arellanes, 17 Cal. 537.

Mexican and Spanish law which prevailed in California when it became a part of the United States. It was adopted after a vigorous debate in the constitutional convention of 1849, where it was said "it will be remembered that this section is and always has been the law of the country."<sup>3</sup>

The community system may, in consideration of its influence upon the legal and economic development of the State, be regarded as one of the most important land marks of Spanish civilization in California. As an example of the development of the law its history is of peculiar interest to the student. Its progress may be traced for more than fourteen centuries in Germany,<sup>4</sup> Holland,<sup>5</sup> France<sup>6</sup> and Spain; it was transplanted to the West Indies, to North and South America and even to the Philippines.

It will first be necessary to review very briefly the history of the Spanish legislation on this subject, because the laws of Spain are not found in a single Code or collection, but in a series of compilations, beginning with the *Fuero Juzgo* (A. D. 687-700). It is to these compilations that reference is made by the Courts in order to determine the full meaning of the provisions concerning the community.

It may be asserted upon excellent authority that the community system was introduced into Spain by the Visigoths.<sup>7</sup>

Legal historians have reached this conclusion after careful investigation and have furnished affirmative as well as negative evidence in support thereof. At the time of the invasion of Spain by the Visigoths, in the year A. D. 414 (or 415), the law of community property prevailed among the Goths as an unwritten law. Traces of it have also been found among the other Germanic tribes of that period in Central Europe.<sup>8</sup>

Moreover, the marital community has retained its place in the German law to this day and also prevails in various forms in France and Holland. This is the affirmative evidence that tends to prove that the law of community is of Germanic origin

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<sup>3</sup> Debates of the Constitutional Convention of 1849, page 262.

<sup>4</sup> R. Schroeder; *Deutsche Rechtsgeschichte*, pp. 300, 304, 308, 311, 703, 706, 750.

<sup>5</sup> Burge's *Colonial and Foreign Laws*, Vol. 1, page 276.

<sup>6</sup> Burge's *Colonial and Foreign Laws*, Vol. 1, page 313.

<sup>7</sup> *Cole v. His Executors*, 7 Martin N. S. (La.) 41; 18 Am. Dec. 241; Ballinger on Community Property, page 5, and authorities there cited.

<sup>8</sup> R. Schroeder; *Lehrbuch der Deutschen Rechtsgeschichte*, cited above.

and was introduced into Spain by the Visigoths. The negative evidence may be found in the history of Spain previous to the Visigothic invasion, which shows no trace of the conjugal community. The various races that preceded the Visigoths in Spain, the Iberians, Celts, Phoenicians, Greeks, Carthaginians did not know the community system; and finally for two centuries, immediately preceding the Gothic invasion, Spain had existed under Roman Government and Roman laws, which did not provide for a marital community. "The *communio bonorum* may have been a part of the Roman law at an early period, but before the compilation of the Digest it had fallen into disuse."<sup>9</sup> During the first three centuries of Visigothic rule, and up to the promulgation of the *Fuero de los Jueces* (*Fuero Juzgo*) the first national Code of Spain (A. D. 687-700), the Visigoths and Romans lived under separate systems of law. The first written recognition of the marital community appears in the *Fuero Juzgo*, one of the oldest Codes of Teutonic origin.<sup>10</sup>

This compilation of political, civil and criminal law was the work of the National Councils of Toledo and was first published in Latin (*Forum Judicum*) and later in Spanish. It superseded all former laws and is considered to be the fountain or origin of the Spanish law. The *Fuero Juzgo* represents an amalgamation of the Roman and Gothic law, although nominally the application of the Roman Law is especially prohibited by it.<sup>11</sup> Notwithstanding this fact, the influence of the Roman law may be found throughout the history of the Spanish law; thus, for example, the Roman dotal system exists side by side with the Gothic community of acquests and gains.

In the beginning of the eighth century the Arabs began their invasion, which resulted in the conquest of the greater part of Spain. The *Fuero Juzgo* was however preserved by the Spaniards, who had retreated into the Asturias and Biscayne mountains. The continuous conflict with the Moors finally resulting in the gradual reconquest of Spain, brought about a great change in the laws of Spain under the influence of feudalism. The country came to be divided into a great number of principalities. The period is marked by the recognition of the

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<sup>9</sup> 1 Burge's Colonial and Foreign Laws, page 263.

<sup>10</sup> Del *Fuero Juzgo* L. 17, Tit. 2, Lib. 4.

<sup>11</sup> Del *Fuero Juzgo* L. 8, Tit. 1, Lib. 2.

special privileges of the nobility, the clergy and the municipalities.

In the year 1212 a new compilation, the *Fuero Viejo* of Castille was published in response to the efforts of the nobility. This Code did not, however, relieve the necessity for a national Code, for the *Fuero Juzgo* was still in force in some parts of Spain while the *Fuero Viejo* was applied in others; moreover, there existed a great number of local laws and customs. In order to remedy this evil, Alfonso X., the Wise, published a new collection of laws and customs of the Castilian monarchy in 1255, generally known as the *Fuero Real*. This collection was the precursor of a most important codification, published about 1263 by the same ruler. It is considered a complete treatise on jurisprudence and a monumental work in that it furnished Spain with a uniform national code. It may be stated that its provisions were taken largely from the Roman law.

A number of other collections of laws of this period must be here mentioned: the *Especulo*, also published by Alfonso X. in 1258, and the *Leyes de Estilo*, principally a Code of Practice (1295-1312), and the *Ordeniamento* of Alcala, of 1348; lastly the *Ordeniamento Real*, compiled during the reign of Ferdinand and Isabella (1490).

An important compilation of laws of a civil nature, intended to supplement the existing legislation, were the *Leyes de Toro*.

In 1567 Philip II. sanctioned a compilation or rearrangement of many of the preceding Codes and Laws from the *Fuero Juzgo* to the Laws of Toro, known as *La Nueva Recopilacion*. In 1805 this Code was replaced by *La Novisima Recopilacion*.

Finally there is the Spanish Civil Code, promulgated by decree of July 31, 1889, for Spain and Spanish possessions. It must be noted, however, that this Code expressly preserves many local laws and is often to be supplemented by the compilations above cited.

The laws and compilations to which the student of the law of community property will most often refer, are, in addition to the Civil Code of Spain:

The *Fuero Juzgo*, published 687-700 A. D.

The *Fuero Real*, published 1255.

*Siete Partidas*, published 1263.

*Leyes de Estilo*, published 1300.

Leyes de Toro, published 1502.

Nueva Recopilacion, published 1567.

Novisima Recopilacion, published 1805.

The Spanish-American colonies were regarded as fiefs of the Spanish crown. Laws enacted in Spain, decretos, cédulas were promulgated in the colonies in the name of the sovereign.

These laws were collected in 1661; this compilation is known as the Recopilacion de leyes de los Reynos de las Indias. It contained an enumeration of the exceptions to the law of Spain intended for the military, ecclesiastical and administrative departments of the colonies; as to those parts of the law not treated therein the Code referred back to "the law of Castille" (Book 2, Title 1, laws 1-2). This provision applies to the civil law generally, which was not treated in the Code and includes the law of marital community.

In this way the Spanish law of the community of gains and acquets became the law of Spanish-America, which included the province of California. It continued to be recognized in Mexico after that State, including the province of California, had become independent.<sup>12</sup> Thus this system of community was the law of the land when California became a part of the United States in 1848. In the natural course of events the Spanish system of community property was incorporated in the first constitution of the State of California. Although it was foreign to the common law, it was indigenous to California, where it had long been applied in the determination of its land titles and had become as it were attached to the soil.

In the same manner the community system became the law of Texas and New Mexico. It further extended its influence in the West to Nevada, Arizona, Washington and Idaho. The Spaniards had also introduced the law of community property in the Louisiana territory and in Florida; it formerly existed in Missouri, Arkansas, Iowa, Mississippi and Louisiana. In all of the States mentioned in the last sentence, with the exception of Louisiana, it has been replaced by the common law.

### Definition.

The Spanish law of marital property is set forth under a number of separate titles:

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<sup>12</sup> Pandectas Hispano, Mejicanas o sea Codigo general (Mejico, 1840). Schmidt, Law of Spain and Mexico, Art. 40 et seq.

1. Contracts concerning property on account of marriage.
2. Dos (dowry) and paraphernia.
3. Conjugal community.

The last named topic is that of which we here discuss. The contracts on account of marriage, the dos and paraphernia, will be referred to only in so far as it is necessary to define the conjugal community.

In this connection it must first be stated that persons, who are about to be united in marriage, may execute contracts stipulating the conditions for the conjugal society in reference to present and future property.<sup>13</sup> We are here considering however not the contractual community but the statutory community. "In default of contracts about property, it shall be understood that the marriage has been contracted under the system of legal conjugal community."<sup>14</sup>

The Spanish law provided and still provides for a community of acquests and gains between husband and wife, which begins with the consummation of the marriage and terminates with its dissolution. These acquests and gains are termed bienes gananciales. The community consists of the property acquired by husband and wife during marriage by "onerous" title,—labor or other valuable consideration,—as distinguished from "lucrative" title—gift, legacy, devise, succession;<sup>15</sup>—to this must be added the fruits of the separate property of either spouse. The Spanish jurist Febrero defines it as "all that property which the husband and the wife, or whichever of them, acquire or get by increase during the matrimony by purchase or other contract or through their toil or industry, as well as the fruits of the separate property, which each one brought to the matrimony and of all that which this acquisition produced by whatever title acquired."<sup>16</sup>

The community also includes the property acquired by husband and wife by joint title.<sup>17</sup>

It must be noted before going further, that the Spanish law

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<sup>13</sup> Spanish Civil Code, §1315; see Walton's translation, p. 362 and authorities there cited.

<sup>14</sup> See Note 13, this page.

<sup>15</sup> Escriche, Onerous Title; Lucrative Title.

<sup>16</sup> 1 Febrero Nov. L. 1, T. 2, C. 8, § 1.

<sup>17</sup> Escriche Title Bienes Gananciales, Nov. Recop., L. 1, T. 4, Book 10; Pandectas Hispano-Mejicanos, Vol. 2, p. 447.

represents a combination of the community of acquets and gains with the Roman "dos" or dowry,<sup>18</sup> and that the gains derived from the dos are a part of the community.

The relation of the dos to the community may be briefly commented upon here:

The husband and wife may both bring property into the marriage. The property contributed by the wife is termed "bienes dotales" (dowry) and "bienes paraphernales."

"Bienes dotales" are composed of the property and rights brought as such by the wife to the marriage at the time of contracting it and of those, which she acquires during the marriage by donation, inheritance or legacy as dotal property.<sup>19</sup>

Paraphernales include the property, which the wife brings to the marriage, not included in the dowry, and what she acquires after the consummation of the same and which is not added to such dowry.<sup>20</sup>

"Arras" is that which the husband gives to the wife by reason of the marriage.<sup>21</sup>

Gifts on account of marriage (*donatio propter nuptias*) are defined as follows:

Donations on account of marriage are those made before its celebration in consideration of the same and in favor of one or both intended consorts.<sup>22</sup>

Ballinger says in this connection:

"The right to *ganancias* is founded upon the partnership or society, which is supposed to exist between the husband and wife, because she brings her fortune (*capitales*) in dote, gift and paraphernalia and he his arras, wherefore it is directed that the gains (*ganancias*) which result from the joint employment of this mass of property or capital be equally divided between both partners."<sup>23</sup>

When the Spanish community system was adopted in California, the provisions concerning dowry were not included because they were inconsistent with the independent position con-

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<sup>18</sup> Spanish Civil Code, Art. 1336.

<sup>19</sup> Spanish Civil Code, Art. 1336.

<sup>20</sup> Spanish Civil Code, Art. 1381.

<sup>21</sup> Partida Book IV, Title XI, L. 1.

<sup>22</sup> Spanish Civil Code, Art. 1327; see Walton's translation, p. 364, and authorities there cited.

<sup>23</sup> Ballinger, *Community Property*, p. 24; *Asso y Manuel*, L. 1, Tit. 6, Cap. 5.



ferred upon the wife by Art. XI §14 of the Constitution of 1849, which gave her the right to the whole administration of all her property not belonging to the community. The dotal system has been adopted only in Louisiana and New Mexico.

It is not the writer's purpose to discuss the very extensive provisions concerning the "dos." It will be sufficient to state, that the property brought into the marriage as dowry does not become a part of the common property, though its fruits are a part of the community.<sup>24</sup>

As opposed to the gananciales the separate property of the spouses is termed bienes propios.

In defining the Spanish community, it should be stated, that it is often referred to as a partnership between husband and wife. The conjugal community is not, technically speaking, a partnership because it is not founded on a contractual relation and because the resulting rights are not based upon the amount of property contributed. Nevertheless the comparison with a partnership brings to mind graphically the thought which underlies the community of acquests and gains: a sharing of the gains and losses in the venture of matrimony and an equal division upon dissolution.<sup>25</sup>

Moreover, the Spanish law itself refers to the provisions concerning partnership: "the conjugal community shall be governed by the rules of the partnership in all that does not conflict with the express provisions of this chapter."<sup>26</sup> In Schmidt's Law of Spain and Mexico, Art. 43, we find the following: "the law recognizes a partnership between husband and wife."

### **The Extent of the Community.**

The community property of husband and wife consists of:

1. All property of whatever nature, which the spouses acquire by their own labor and expense (onerous title).<sup>27</sup> This includes property acquired during the marriage at the expense of the community.<sup>28</sup>

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<sup>24</sup> Spanish Civil Code, Art. 1396, subd. 1.

<sup>25</sup> "The law recognizes a partnership between husband and wife." Schmidt, Law of Spain and Mexico, Art. 43.

<sup>26</sup> Spanish Civil Code, Art. 1395.

<sup>27</sup> Civil Code of Spain, Art. 1401, Subd. 2; Fuero Real C. 1, T. 3, B. 3; Novísima Recopilación C. 5, T. 4, B. 10.

<sup>28</sup> Civil Code of Spain, Art. 140, Subd. 1.

2. Property acquired jointly in the name of both husband and wife.<sup>29</sup>

3. The fruits of income of individual property of husband and wife,<sup>30</sup> or of the community property.<sup>31</sup>

It will be noted that the community system was not adopted in its entirety in California; the law of California differs from the Spanish law in this most important respect, i. e., in that the fruits of the separate property do not become community property, but remain separate property. Originally, the Act of April 17, 1850, Section 9, provided that "the rents and profits of the separate property of either husband or wife shall be deemed common property." This provision was, however, declared unconstitutional in *George v. Ransome*, 15 Cal. 323. In consequence of this decision, the statute was amended so as to designate as separate property the fruits of separate property. The Spanish law has, however, been preserved in this respect in Texas, Louisiana and Idaho.

The Spanish conjugal community may be defined conversely by describing the property which it does not include, to wit:

1. Property owned by either husband or wife before marriage, and profits due at time of marriage although collected afterward.<sup>32</sup>

2. That acquired under a lucrative title by either of the spouses during the marriage.<sup>33</sup>

3. That bought with separate funds or exchanged for separate property.<sup>34</sup>

All the property of the marriage is considered as community property until it is proven that it belongs exclusively to the husband or to the wife.<sup>35</sup>

Augmentations of separate property caused by nature alone, without labor or skill are separate property.<sup>36</sup>

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<sup>29</sup> Escribiche *Titulo Bienes Gananciales*; *Novisima Recopilacion* C. 1, T. 4, B. 10; *Pandectas Hispano Mejicanas*, Vol. 2, p. 447.

<sup>30</sup> *Novisima Recopilacion* L. 5, T. 4, B. 10.

<sup>31</sup> *Civil Code of Spain*, Art. 1401.

<sup>32</sup> Schmidt, *Law of Spain and Mexico*, Art. 45. *Spanish Civil Code*, Art. 1396, Subd. 1.

<sup>33</sup> *Spanish Civil Code*, Art. 1396, Subd. 2.

<sup>34</sup> *Spanish Civil Code*, Art. 1396, Subds. 3, 4; *Feb. Nov. L.* 1, T. 2, C. 8; Ballinger, *Community Property*, page 27; Schmidt, *Law of Spain and Mexico*, Art. 47.

<sup>35</sup> *Spanish Civil Code*, Art. 1407; Schmidt, *Law of Spain and Mexico*, Art. 63.

<sup>36</sup> Escribiche *Bienes Gananciales*.

**Administration of the Community Rights and Obligations. Gifts.**

The husband is the sole administrator of the conjugal community. He can sell and otherwise dispose of it without the consent of his wife provided he does so without intention of injuring her.<sup>37</sup>

As will be seen in the discussion of the dissolution of community, this does not give the husband the right to dispose by will of the entire community; he may do so only in regard to one half.<sup>38</sup>

The husband may make moderate donations to relatives.<sup>39</sup>

The husband is liable for deteriorations, which may happen in the course of administration through his fault.<sup>40</sup>

"The loss or injury caused to the hacienda by reason of the husband having rented it out at a low rate or price or having paid annuities or debts contracted for an illicit cause ought not to prejudice the wife; and therefore in these cases the loss or injury must be deducted from the mass of the property and given to the wife before dividing it."<sup>41</sup>

The wife cannot ordinarily bind the conjugal community without consent of her husband.<sup>42</sup>

The administration may, however, be transferred to the wife, when she has been appointed guardian of the husband or when the latter is declared absent or incapacitated; she may also be granted the administration by the court upon separation.<sup>43</sup>

Under the Spanish as under the civil law donations made between consorts during marriage were null and void.<sup>44</sup>

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<sup>37</sup> Spanish Civil Code, Art. 1412; Schmidt, Law of Spain and Mexico, Art. 51; Nov. Recop., L. 5, T. 4, B. 10, and L. 3, T. 5, B. 10.

<sup>38</sup> Spanish Civil Code, Art. 1414; Schmidt, Law of Spain and Mexico, Art. 52.

<sup>39</sup> Spanish Civil Code, Art. 1415; Goros No. 54.

<sup>40</sup> Schmidt, Law of Spain and Mexico, Art. 55; Goros No. 55.

<sup>41</sup> White's Land Laws, p. 63.

<sup>42</sup> Spanish Civil Code, Art. 1416; Contracts of Married Women, see Schmidt, Law of Spain, etc., Arts. 69-71.

<sup>43</sup> Spanish Civil Code, Arts. 1436, 1441.

<sup>44</sup> Spanish Civil Code, Art. 1334; 4th Partida, L. 4, T. 11; Escriche Donaciones entre Conyuges.

### Charges and Obligations of the Conjugal Community.

The conjugal community is of course responsible for the maintenance of the family;<sup>45</sup> the dote promised the children by husband and wife or by husband alone is to be paid primarily from the ganancial property.<sup>46</sup>

The gains and losses being common, the debts which are contracted during marriage by the husband and by the wife, where she can legally bind the community, are to be paid out of the community property. This does not include the obligations contracted before marriage or after dissolution.<sup>47</sup> The entire community estate, when clearly ascertained, must be regarded as a primary fund for the discharge and satisfaction of the community debts. This was the rule in Spain and is the rule under all laws, where the community doctrine is recognized.<sup>48</sup>

The community is responsible for repairs of the ganancial property. Schmidt in his work on Spanish and Mexican Civil Law states (Art. 48): "Money expended in improving separate property belongs to the community but gives the other no claim to the property itself."

Finally the Spanish Civil Code alters the above rule<sup>49</sup> and provides "that the community shall only be responsible for minor repairs or for mere preservation made during the marriage on the private property of the husband or wife." Extensive repairs are not chargeable to community.

Arrears or interests, matured during the marriage, of obligations which affect the separate property of the consorts, as well as the community property, are borne by the community.<sup>50</sup>

The wife may renounce the community before, during or after its dissolution. In this event, she forfeits all claims to gains and remains discharged from all debts contracted or losses sustained by her husband.<sup>51</sup>

The renunciation must be express and is never presumed.<sup>52</sup>

<sup>45</sup> Spanish Civil Code, Art. 1408.

<sup>46</sup> Nov. Recop. L. 4, T. 3, B. 10.

<sup>47</sup> Fuero Real, L. 14, T. 20, B. 3; Schmidt, Laws of Spain, etc., Art. 50.

<sup>48</sup> Ballinger, Community Property, §120.

<sup>49</sup> Art. 1408, Subd. 3.

<sup>50</sup> Spanish Civil Code, Art. 1408 Subd. 2.

<sup>51</sup> Schmidt, Civil Law of Spain and Mexico, Art. 64; 60th Law of Toro; Nov. Rec., L. 9, T. 4, B. 10.

<sup>52</sup> Schmidt, Civil Law of Spain, etc., Art. 65.

### Dissolution of Community.

The community is dissolved by:

1. Confiscation.
2. Separation from bed and board or a declaration of nullity.
3. Death.<sup>53</sup>

According to Schmidt's Civil Law of Spain, etc., Art. 68, the wife also loses her matrimonial gains.

1. When she has been guilty of adultery.<sup>54</sup>
2. When she abandoned the husband without his consent.<sup>55</sup>
3. When she has joined some religious sect and therein married or committed adultery.<sup>56</sup>

"If the widow lives lustfully and by crime she shall lose her moiety of the gananciales. For the first cause the gananciales will devolve to the heirs of the husband."<sup>57</sup>

"Confiscation dissolves the community from the moment the decree becomes executory, but such decree does in no manner affect the share belonging to the other partner."<sup>58</sup> This mode of dissolution of the community was not applicable to Mexico where confiscation of property was abolished.<sup>59</sup>

The dissolution of the community by separation from bed and board occurs when it is decreed by a competent tribunal.<sup>60</sup>

Either party has the right to proceed to immediate settlement.<sup>61</sup>

"The dissolution by death takes effect from the moment of its occurrence, although the heirs of the deceased spouse continue to live with the survivor."<sup>62</sup>

"Some Spanish jurists, however, insist that upon the death of the husband or wife the community continues between the survivor and their heirs of deceased until partition course."<sup>63</sup>

<sup>53</sup> Schmidt, Civil Law of Spain, etc., Art. 60

<sup>54</sup> Partid., L. 15, T. 17, P. 7.

<sup>55</sup> Fuero Real, L. 5, T. 5, B. 4.

<sup>56</sup> Partid., L. 6, T. 25, P. 7.

<sup>57</sup> Nov. Recop., L. 5 and 11, T. 4, B. 10.

<sup>58</sup> Schmidt, Civil Law of Spain, etc., Art. 59; Nov. Recop., L. 10, T. 4, B. 10.

<sup>59</sup> Schmidt, Civil Law of Spain, etc., Art. 56, Subd. 2.

<sup>60</sup> Schmidt, Civil Law of Spain, etc., Art. 60.

<sup>61</sup> Schmidt, Civil Law of Spain, etc., Art. 61; Goros No. 61.

<sup>62</sup> Schmidt, Civil Law of Spain, etc., Art. 57; Goros No. 57.

<sup>63</sup> Ballinger on Community Property, § 217.

In the case of *Panaud v. Jones*, 1 Cal. 438, it was held that under the Spanish law, the mother's half of the community does not vest in her heirs at her death, but that their interest is not perfected till after the father's death, who up to that time has the administration and may dispose of the property.

This case is referred to by the Supreme Court of Texas in *Thompson v. Craig*, 24 Tex. 600-605, where it is demonstrated in a satisfactory manner by extended reference to the leading authorities that the community ceases with the death of one of the spouses and that the position taken in *Panaud v. Jones* is based upon a misconception. It was generally required that an inventory should be made immediately upon dissolution.<sup>64</sup>

### **Division of the Community Upon Death of one of the Spouses.**

"The principles upon which the ganancial system of Spain is based, were carried out in the distribution of the marital estate on dissolution by death of one of its members to its logical conclusion, namely: an equal division of the assets between the survivor and the heirs of the deceased spouse."<sup>65</sup>

As has already been stated, the community ceases with the death.

In order to avoid the injury that may be done by so sudden a dissolution of the community, and to permit the continuance of its advantages, a new community may, however, be created between the heirs and the survivor.<sup>66</sup>

"All property possessed by husband and wife is presumed to be community and is to be divided equally unless it can be proved that a portion of the same is the individual property of one of them."<sup>67</sup>

"The marriage having been dissolved, the survivor has the absolute disposition and ownership of half of the gananciales, without being compelled to reserve any portion for the children, provided he does not deprive them of their lawful portion."<sup>68</sup>

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<sup>64</sup> Spanish Civil Code, Art. 1418.

<sup>65</sup> Ballinger on Community Property, § 217.

<sup>66</sup> Schmidt, Laws of Spain, etc., Art. 58.

<sup>67</sup> Schmidt, Laws of Spain, etc., Art. 63; Nov. Recop. L. 4, T. 4, B. 10.

<sup>68</sup> Schmidt, Laws of Spain, etc., Art. 67; Nov. Recop. L. 6, T. 4, B. 10.

The law of California has modified the law in so far as the rights of the husband are concerned,—it provides that upon the death of the wife the entire community goes to the husband (without administration).<sup>69</sup>

Concerning the transformation of the wife's interest in the community upon the death of the husband—Febrero states:<sup>70</sup>

“The wife is clothed with the revocable and feigned dominion and possession of one-half of the property acquired by her and her husband during the marriage; but after his death it is transferred to her effectively and irrevocably, so that by his decease she is constituted the absolute owner in property and possession of the half which he left.”

With reference to the disposition of the community interest by will it must be noted that the testator may only dispose of his half of the community.<sup>71</sup>

The mode of descent and distribution of the community property to the heirs of the deceased spouse under the Spanish law will not be here considered, as it involves an extended exposition of this branch of the law.

The above is intended as a brief resume of the essential provisions of the Spanish law of community property (*ganancias*) as they existed in California at the time of its accession into the Union. As has already been noted, the law of the *ganancias* was not followed in its entirety in this State. Each State in which the community system exists has adapted it to the conditions existing within its boundaries with widely different results. The fundamental principle, however, of the sharing of the gains and losses during the marriage remains unimpaired. The most important modification of the Spanish system was that abolishing the system of dowry and giving the wife the sole administration of her separate property and the fruits thereof.

WALTER LOEWY.

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<sup>69</sup> Civil Code of California, § 1401.

<sup>70</sup> 1 Feb. Mej. 225, § 19.

<sup>71</sup> Nov. Recop., L. 8, T. 4, B. 10.